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No. 99-1277

IN THE

Supreme Court of the United States

PHILIP MORRIS INCORPORATED, ET AL.,
Petitioners,

v.

HOWARD A. ENGLE, M.D. ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Florida District Court of Appeal for the Third District

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37(2)(b), the Chamber of Commerce of the United States ("the Chamber") respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the Petition for Writ of Certiorari in this case. The written consent of the petitioners has been filed with the Clerk of the Court. Counsel for the respondents has refused to consent to the filing of this brief.

The Chamber is the nation's largest business federation representing an underlying membership of more than three million businesses and professional organizations of every size, in every sector of business, and in every state. As the principal voice of American business, the Chamber regularly advocates the interests of its members in court on issues of critical concern to the business community. This case is significant to the Chamber and all of its members who rightly expect impartiality from a neutral arbiter.

The question presented in the Petition is whether a trial court judge with a direct personal stake in the outcome of this litigation may continue to serve as the presiding judge in a multi-billion dollar class action lawsuit, when he is a former smoker, he suffers from illnesses of the type respondents claim were caused by petitioners, and his membership in respondents' class is undisputed. The judge's failure to recuse himself – effectively sanctioned by the Florida appellate courts given their refusal to grant review – conflicts with the settled law of this Court, and threatens the constitutional rights not only of petitioners but of corporate and institutional defendants nationwide. This case is thus of great concern to the business community because of the due process rights at stake and the dangerous precedent the trial court's decision would set by undermining a bedrock constitutional principle – that judicial decision-makers must be neutral and impartial both in reality and appearance.

In filing a brief as *amicus curiae*, the Chamber seeks to supplement, rather than duplicate, petitioners' arguments. While petitioners certainly assert a similar interest in this appeal, they necessarily do so from the far more limited perspective of litigants in a particular industry seeking to protect their interests in this case-specific context. The Chamber, in its *amicus* brief, provides this Court with the broader perspective and concerns of the overall American business community. The Chamber's brief, moreover, details the risk of potential linkage between the judge's personal circumstances and his legal rulings. In light of the Chamber's special perspective, the Chamber's brief plainly falls within the category of submissions likely to aid the Court's work because it "'inform[s] the court of interests other than those represented by the parties, and . . . focus[es] the court's attention on the broader implication[s] of various possible rulings.'" Robert L. Stern et al., *Supreme Court Practice* 562 (7th ed. 1993).

For the reasons given, *amicus* The Chamber of Commerce for the United States therefore respectfully requests leave to file the accompanying brief.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

Amicus curiae, the Chamber of Commerce of the United States of America ("the Chamber"), is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations, with 140,000 direct members, in every size, sector, and geographic region of the country.[1]

The Chamber regularly advances the interests of its members in court on issues of critical concern to the business

[1] No counsel of any party authored any part of this brief, and no person or entity, other than the *amicus curiae*, its members, and its counsel, made a monetary contribution to the preparation and submission of this brief.

community, and has filed *amicus* briefs in more than 500 cases before this Court, the United States Courts of Appeals, and various state supreme courts. The Chamber has participated as *amicus curiae* in nearly every constitutional punitive damages case in recent years,[2] and also has filed *amicus* briefs in numerous cases addressing issues of class certification.[3] However, it has never before participated in a case such as this where, in blatant violation of elemental due process, the judge making decisions regarding a class of possibly over three quarters of a million people and seeking compensatory and punitive damages of more than $200 billion is himself a member of the respondents' class who stands to profit from his own rulings. The precedent set by the Florida appellate courts in sanctioning Judge Kaye's refusal to recuse himself from presiding over the *Engle* class action reverberates far beyond the merits of this case. It is a serious threat to any defendant, corporate or otherwise, who rightly expects impartiality before a neutral arbiter. As the principal voice of the U.S. business community, the Chamber is well situated to address the due process concerns raised by the judge's misconduct and its impact on the integrity of the legal system.

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[2] These cases include *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991); and *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

[3] These cases include *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *State Farm Mutual Auto Insurance Co. v. Speroni*, 119 S. Ct. 276 (1998); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742 (4th Cir. 1998); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); and *Washington Mutual Bank, FA v. Superior Court*, No. S070418 (Cal. Aug. 26, 1999) (pending).

SUMMARY OF ARGUMENT

This case threatens fundamental principles of due process. Despite a clear and undisputed personal and financial involvement in the outcome of this case as a member of the respondents' class, the trial judge, Robert P. Kaye, has refused to recuse himself from presiding over the *Engle* class action litigation. Judge Kaye has reached that decision despite unequivocal case law from this Court, and indeed every American jurisdiction, mandating the principle that litigants have a right to an impartial forum before an arbiter with no personal interest in the outcome of the case. *See, e.g., Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975).

That principle has been plainly violated. Judge Kaye, a former smoker, has a heart disease that is of the type that respondents allege was caused by petitioners. *See* Petition at 6 (citing Motion to Disqualify, Exh. A., *Engle v. R.J. Reynolds Tobacco Co.*, No. 94-08273 CA 22 (Fla. Cir. Ct. Aug. 2, 1999)); *see also id.* at 14. Indeed, respondents' entire theory of the case is that individuals who suffer from angina and arteriosclerosis (the very diseases Judge Kaye has) as a result of being smokers (which Judge Kaye formerly was) fall within the class definition, which includes

> [a]ll [Florida] citizens and residents, and their survivors, who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine.

R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39, 40 (Fla. Dist. Ct. App. 1996). Neither Judge Kaye, respondents, nor the Florida courts have disputed Judge Kaye's illnesses, his status as a former smoker, or his membership in the class.

Because Judge Kaye's diseases place him squarely within the class of litigants – estimated by respondents to include 225,000 to 850,000 individuals – he (like other class members) stands to benefit significantly from the litigation if

the pending multi-billion dollar lawsuit succeeds. The stakes are enormous; respondents seek more than $200 billion in compensatory and punitive damages – a judgment at this level is likely to be unbondable, impeding for all practical purposes an appeal from Judge Kaye's rulings.[4] And Judge Kaye's individual stake has the potential to be quite substantial. Under respondents' own estimates, each class member would receive an award of $209,000 per person – a per-person award figure that would be substantially increased if, as is likely, the class size and number of successful litigants is reduced.

Ironically, in light of his condition, Judge Kaye likely would not have permitted himself to be a *juror* in this case. Recognizing the risk of bias – both real and perceived – from current and former smokers, Judge Kaye disqualified hundreds of potential jurors with conditions similar to his own. *See* Petition at 4-5. These disqualifications were a correct and necessary application of the law preserving the impartiality of the judicial process. Yet, Judge Kaye failed to apply these standards to his own circumstances. He declined to recuse himself as the *presiding judge* – a role that has as much, if not more, pervasive impact than that of a juror. His failure to remove himself, and thus make way for the appointment of a neutral decision maker, contravenes

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[4] *See Proprietors Ins. Co. v. Valsecchi*, 385 So. 2d 749, 750 (Fla. Dist. Ct. App. 1980) (quoting Fla. R. A[illegible] P. 9.310(b)(1) (requiring that litigants appealing an adverse final money judgment "may obtain an automatic stay pending appeal . . . by posting a good and sufficient supersedeas bond in the amount ordered to be paid by said money judgment plus 15 percent thereof")); *Garcia v. Garcia*, 743 So. 2d 1225, 1226 (Fla. Dist. Ct. App. 1999) (same); *Pabian v. Pabian*, 469 So. 2d 189, 190 (Fla. Dist. Ct. App. 1985) ("A stay pending review may be conditioned upon the posting of a good and sufficient bond, other conditions, or both."); *see id.* at 191 ("the guiding principle in setting a supersedeas bond is to protect the party in whose favor judgment was entered by assuring its payment in the event the judgment is affirmed on appeal").

seminal decisions of this Court, undermines the constitutional rights of litigants, derogates from the integrity of the legal process, and erodes the public's confidence in the judicial system itself. In light of the magnitude of the judge's error (effectively sanctioned by the Florida appellate courts by their refusal to grant review), and the sweeping ramifications of that decision – for litigants, the public, and fundamental constitutional norms – this Court's intervention is necessary. *Amicus* therefore urges this Court to grant the Petition for plenary review or, at the very least, for purposes of summarily reversing the decision below pursuant to Supreme Court Rule 16.1.

ARGUMENT

I. THE TRIAL JUDGE'S FAILURE TO RECUSE HIMSELF CONFLICTS WITH FUNDAMENTAL PRINCIPLES OF DUE PROCESS.

The Due Process Clause embodies two important principles. First, litigants must be guaranteed a free and fair trial, and second, an impartial decision-maker is essential to safeguard the fairness and integrity of the judicial process. As this Court stated in *Bracy v. Gramley*, 520 U.S. 899 (1997):

> the floor established by the Due Process Clause clearly requires a 'fair trial in a fair tribunal' before a judge with no actual bias against the defendant or interest in the outcome of his particular case.

Id. at 904-05 (citations omitted). Because of this Court's appropriate concern with the moral integrity of the law, even decision-makers with "no actual bias" may be disqualified if there is even the perception of bias since "the appearance of evenhanded justice . . . is at the core of due process." Laurence H. Tribe, *American Constitutional Law* § 10-16, at 745 & n.3 (2d ed. 1988) (citing cases).

As this Court's precedents make clear, an important indicator of judicial bias is a direct, personal financial stake in the outcome of litigation. *See, e.g.*, *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). Although hesitant to define with "precision" when a judge must be disqualified from a case, this Court has recognized that

> a reasonable formulation of the issue is whether the "situation is one which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true."

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 822 (1986) (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)). There is a risk, Chief Justice Rehnquist has aptly observed, that a judge with a personal stake in a case will either over- or under-compensate as a result of "the prospect of financial benefits on the hand, or the fear of criticism that he may have acted in view of that prospect, on the other." The Honorable William H. Rehnquist, *Sense and Nonsense About Judicial Ethics*, 28 A.B. City N.Y. 694, 700 (1973). A pull in *either* direction corrupts the judicial process and impedes the neutrality and agnosticism about outcomes that judges must have, in reality and in the eyes of the public.

The constitutional imperative that triers-of-fact must have no direct personal involvement in a case is deeply rooted in this Court's precedents. For instance, in *Morrisey v. Brewer*, 408 U.S. 471 (1972), this Court held that due process requires that after an arrest, the determination of whether a "reasonable ground exists for revocation of parole should be made by someone not directly involved in the case." *Id.* at 485. Significantly, the Court stated:

> [W]e need make no assumptions one way or the other to conclude that there should be an uninvolved person to make [a] preliminary evaluation of the basis for believing the conditions of parole have been violated. The officer directly involved in making

> recommendations *cannot always have complete objectivity in evaluating them.*"

Id. at 485-86 (emphasis added); *see also Goldberg v. Kelley*, 397 U.S. 254, 271 (1970). Here, too, when the presiding judge, as a member of the respondents' class, has a direct, personal financial stake in the outcome of litigation, no matter how well-intentioned he may be, there is the unmistakable danger that he will lack the "complete objectivity" necessary to adjudicate the case. Although *amicus* has no knowledge that Judge Kaye has issued legal rulings as a result of his membership in the class or his ability to potentially benefit financially from the litigation, his personal circumstances create both a perception and a real risk of actual bias, denying petitioners a free and fair trial guaranteed by the Due Process Clause.

Indeed, throughout this litigation, Judge Kaye has made a series of decisions that, at a minimum, create the perception of bias, undermining the overarching requirement that decision-makers be neutral in both fact and in appearance. Perhaps Judge Kaye's most troublesome decision is the unprecedented bifurcated trial process he has established. Under his approach, the jury adjudicating the multi-defendant class action litigation in Florida will determine whether petitioners must pay a lump-sum punitive damages award *prior to*, and wholly apart from, any consideration of petitioners' liability to individual class members for compensatory damages. This process is patently at odds with this Court's decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), which requires a close connection between the degree of damage caused by the defendant and the size of any punitive award.

During Phase 1 of the *Engle* trial, the jury considered only the so-called "common" classwide issues involving petitioners' alleged conduct. The jury was not required, however, to determine (i) whether petitioners' conduct, in

fact, caused cognizable injury to the named or unnamed class members; (ii) whether, and to what extent, such respondents are entitled to compensatory relief of any kind; or (iii) even to specify whether any particular conduct of the petitioners supported any punitive damages findings. Those issues will not be resolved until Phase 3 of the trial *after a different jury* in Phase 2 already has decided whether to impose a lump-sum punitive damages award based on the generalized harm petitioners allegedly caused the class as a whole. This process inverts the proper constitutional sequence, putting the "cart" (punitive damages) before the proverbial "horse" (liability and compensatory damages determinations) and necessitates the convening of multiple juries – all squarely in conflict with the standards articulated by *Gore* and its progeny.

Specifically, each of the three factors established in *Gore* to determine whether a punitive award may be sustained – (1) "the degree of reprehensibility" of the conduct that formed the basis of the civil suit; (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award; and (3) "the difference between this remedy and the civil penalties authorized or imposed in comparable cases," 517 U.S. at 574-75 – requires a *prior* determination of liability and compensatory damages before punitive damages may be imposed.

That is the exact opposite of what Judge Kaye's Order mandates in this case. Indeed, the judge's approach raises the specter that a jury will impose punitive damages without any evaluation of the evidence applicable to the host of named and unnamed class members, without any examination of whether there are mitigating factors that reduce or eliminate petitioners' liability, and without any assessment of whether there are justifiable affirmative defenses that either extinguish legal blame altogether or reduce the reprehensibility of petitioners' conduct. *See Gore*, 517 U.S. at 576 ("all acts that cause economic harm

[are not invariably converted] into torts that are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages"). The fact that jurors will have no idea how many class members can establish cognizable injury attributable to the petitioners, and of what nature such injury may be, further distorts the process. Clearly, a jury's assessment of the need and justification for punitive damages should and – but for the Order below – would vary significantly depending on whether the class is comprised of 200, 2,000 or 2 million members or whether the injuries are minor, critical, or incurable. The process the judge has set in motion thus raises the unacceptable risk that "punitive damages may . . . be 'grossly out of proportion to the severity of the offense,'" 517 U.S. at 576, in violation of the central due process holding in *Gore*.

Under the judge's Order, moreover, one jury could well impose a fixed, astronomical punitive damages award during Phase 2 of the trial while a different jury in Phase 3 could discover that only a small fraction of the class actually can establish cognizable injury and entitlement to compensatory and punitive damages. Such a result – reached years after the award of punitives by the prior jury – would create an enormous windfall for the successful class members (who may include Judge Kaye himself), who then will receive a pro rata punitive award grossly out of proportion to proven compensatory losses. That the initial lump-sum punitive award might be reduced on appeal does not obviate the constitutional concerns caused by the trial court's Order or reduce the *in terrorem* effect of massive punitive liability inducing settlement at excessive values well before review can be obtained.

In short, the bifurcated process the judge has authorized – together with his personal stake in the litigation – will send defendants engaged in class action litigation the disturbing signal that the judicial process they face may not be conducted in the traditional manner and in

accordance with constitutional norms. Although the bifurcated trial is not yet ripe for this Court's review, the recusal decision is appropriate for, and warrants, immediate action. Indeed, if review is not had now, it may not be available as a practical matter later in this litigation. The sheer magnitude of the punitive damages award contemplated by Judge Kaye's unprecedented bifurcation ruling raises the specter of an unbondable judgment. *See supra* at 6 & n.4. Such a result effectively would nullify any right of appeal and compel petitioners, irrespective of their view of the merits of respondents' claims and out of sheer self-preservation, to settle the case, and thus fall prey to what has been termed a legally sanctioned form of blackmail. *See, e.g., In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (acknowledging Judge Henry J. Friendly's statement that "settlements induced by a small probability of an immense judgment in a class action [are] 'blackmail settlements.'").

Reversal of the decision below is thus necessary not only to protect petitioners' rights in this case but to safeguard important constitutional norms and preserve the public's confidence in, and the integrity of, the judicial system.

II. SUMMARY REVERSAL IS WARRANTED AND IS CONSISTENT WITH PREVIOUS USES OF RULE 16.1.

Because Judge Kaye's recusal from this case was so clearly mandated by governing law, *amicus* urges the Court to grant the Petition either for consideration on the merits or for summary disposition under Supreme Court Rule 16.1. The latter disposition also is appropriate because the recusal decision conflicts squarely with settled Supreme Court law, and thus falls within the category of cases this Court has granted for purposes of summary disposition without a full hearing on the merits. *See, e.g., Mireles v. Waco*, 502 U.S. 9 (1991); *Hunter v. Bryant*, 502 U.S. 224 (1991); *Smith v.*

Ohio, 494 U.S. 541 (1990), *Olden v. Kentucky*, 488 U.S. 227 (1988); *Pennsylvania v. Bruder*, 488 U.S. 9 (1988); *Pease v. Hansen*, 404 U.S. 70 (1971). All of these cases – and numerous others like them – involve instances in which "the lower court result is so clearly erroneous . . . that full briefing and argument" is unnecessary. Robert L. Stern et al., *Supreme Court Practice* 247 (7th ed. 1993).

By sanctioning Judge Kaye's continued involvement in this case, the Florida appellate courts in this case not only have ignored their responsibilities under the Supremacy Clause, but have done so in a setting where the sheer enormity of the stakes may preclude as a practical matter petitioners' right of appeal.

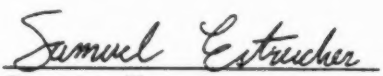
Without this Court's intervention, petitioners' right to a free and fair trial adjudicated by an impartial decision-maker will be defeated. But the costs of Judge Kaye's errors will be visited well beyond this case. To allow Judge Kaye's continued involvement in this case – the inevitable result of a denial of certiorari – would threaten the expectations of litigants nationwide that their cases will be adjudicated by neutral and impartial decision-makers. If that expectation is diminished, corporate and other institutional defendants lacking confidence that they will receive a fair trial may feel pressure to submit to "'blackmail settlements,'" *Rhone-Poulenc*, 51 F.3d at 1298, by settling cases that on their merits should be litigated, and the public may grow increasingly cynical of the fairness and integrity of the judicial system. To avoid such consequences – precisely the kinds of harms the Due Process Clause aims to prevent – review of the Petition is urgently needed.

CONCLUSION

For the reasons stated, *amicus* The Chamber of Commerce of the United States respectfully requests that this Court grant the Petition for plenary review or for purposes of

summarily reversing the trial court's recusal decision consistent with Supreme Court Rule 16.1.

Respectfully submitted,



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